

**In Re: Objection to Amendment to Approval No. AW #5076/ FARM ID #6165;
Confined Feeding Operation, DeGroot Dairy, Huntington County, Indiana.**

**Donald Lindsey and Jaquelyn Lindsey, Petitioners; DeGroot Dairy, LLC, Permittee/Respondent;
Indiana Department of Environmental Management, Respondent
2006 OEA 1 (05-S-J-3500)**

OFFICIAL SHORT CITATION NAME: When referring to 2006 OEA 1, cite this case as
DeGroot Dairy CFO, 2006 OEA 1.

TOPICS:

| | |
|--|--|
| confined feeding operation | aggrieved or adversely affected |
| 12(B)(6) | runoff |
| Motion to Dismiss | leachate |
| NPDES | waters of the State |
| Claim upon which relief can be granted | amended Petition for Administrative Review |
| Agreed Judgment | 13-15-6-2 |
| construction | 315 IAC 1-3-2 |
| operation | <i>Kunz</i> |
| excavation | project cost |
| process wastewater control system | future violations |
| adjoining property owners | |

PRESIDING JUDGE:

Dauidsen

PARTY REPRESENTATIVES:

Permittee: Peter Racher, Esq., Todd J. Janzen, Esq., Plews Shadley Racher & Braun
Petitioner: David C. Van Gilder, Esq., Van Gilder & Trzynka
IDEM: Joseph H. Merrick, Esq.

ORDER ISSUED:

January 30, 2006

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

Judicial Review initiated in the Huntington Superior Court 1,
Cause Number 35DO1-0602-PL-61.

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asserted, without contravention, that the Permitted activity replaced an existing system approved by IDEM in 2001. Dairy's March 11, 2005 Motion to Dismiss for Failure to State a Claim ("Motion to Dismiss") at 2.

2. On January 25, 2005, a Petition for Administrative Review and Stay of Effectiveness of the Amendment ("Petition") was filed by Petitioners, Donald Lindsey and Jacquelyn Lindsey, by counsel. The Lindseys alleged that they adjoining property owners to the Dairy, and were therefore directly affected by IDEM's approval of the Amendment.
3. In their Petition, the Lindseys stated the following contentions for being aggrieved and adversely affected by, and therefore appealing, IDEM's approval of the Amendment:
 - a. Since Dairy operations began, and through the date of the Petition, the Dairy caused or allowed discharge of animal manure, silage runoff and leachate, and contaminated Dairy stormwater runoff to discharge onto the Lindsey's real property and into the waters of the State, in violation of numerous state laws, and in violation of the Permit. Petition at 2, para. 4
 - b. The Permit allows the Dairy to continue to operate in a manner harmful to the environment in general and to the Lindseys, as adjoining landowners, in particular. Petition at 2, para 5.
 - c. The Permit allows the construction of a third open basin for the collection of contaminated water, which the Dairy has historically failed to contain and control. Petition at 2, 3, para. 6.
 - d. the Dairy began excavation and collection of stormwater, silage leachate and other manure-contaminated wastewater weeks before the Permit was issued, "this fact again reveals this operator's absolute failure to understand and abide by the rule of law." Petition at 2, para. 8.
 - e. The Permit's failure to include conditions sufficient to protect the environment and the Lindseys from harm, and its terms "may not be consistent with the operating and maintenance requirements for the individual National Pollution Discharge Elimination System ("NPDES") Concentrated Animal Feeding Operation ("CAFO") permit that is currently under consideration by IDEM." Petition at 2, 3, para. 9.

The Lindseys supported their request for a stay of effectiveness of the Permit upon the assertion that immediate construction, excavation, and wastewater collection activity on the Dairy's property would cause the Lindseys and the waters of the State irreparable harm for which no adequate remedy at law existed.

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4. A telephonic prehearing conference was held on February 10, 2005. No hearings were conducted. The Court's record in this matter contains the following documents (no other evidence was presented):

| | |
|---------------------|---|
| January 25, 2005 | Petition |
| January 28, 2005 | Order Scheduling February 10, 2005 Prehearing Conference and March 14, 2005 Stay Hearing |
| February 8, 9, 2005 | Appearances by IDEM counsel |
| February 9, 2005 | Appearance by Dairy's counsel; Lindsey's Notice of Withdrawal of Stay Request |
| February 10, 2005 | Court Order Vacating Stay Hearing and Order for Telephonic Prehearing Conference; Court Order Requesting Status Report by March 14, 2005 |
| March 11, 2005 | Lindsey's Status Report with proposed case management order; Dairy's Motion to Dismiss |
| March 14, 2005 | Dairy's Status Report and proposed scheduling order |
| March 16, 2005 | Order Scheduling Case Management Order, with Lindseys to submit Amended Petition for Administrative Review, if any, by April 1, 2005, and disclosure of expert witnesses in compliance with Tr. R. 26(b)(4) by April 11, 2005 |
| April 11, 2005 | Lindsey's Response to Dairy's Motion to Dismiss; Lindsey's Preliminary Witness and Exhibit List; Dairy's Preliminary Witness and Exhibit List; IDEM's Preliminary Witness and Exhibit List |
| May 2, 2005 | Dairy's Reply in Support of Motion to Dismiss |
| May 12, 2005 | Dairy's Motion to Strike Lindsey's Expert Kathy Martin |
| May 17, 2005 | Court Order scheduling responses |
| May 25, 2005 | Dairy's Motion for Summary Judgment |
| May 27, 2005 | Dairy's Appearance by counsel Peter M. Racher, Esq.;; Lindsey's Amended Expert Disclosure |
| June 22, 2005 | Dairy's Motion to Withdraw Admissions |
| June 24, 2005 | Lindsay's Opposition to Dairy's Motion for Summary Judgment |
| June 28, 2005 | Court's Order Revising Case Management Order to provide response; Hearing on pending motions |
| July 8, 2005 | Dairy's Response to Lindsey's Motion to Withdraw Admissions and Reply to Summary Judgment |
| July 18, 2005 | Dairy's Motion to Compel |
| July 28, 2005 | IDEM's Appearance by counsel Hala K. Silvey, Esq.;; IDEM's Second Motion to Amend Case Management Order |
| September 16, 2005 | Dairy's summary submission of pending motions with cover letter |
| September 23, 2005 | Lindsey's Motion to Stride Dairy's September 16, 2005 submission |
| October 5, 2005 | Court Order setting matter for October 13, 2005 status conference |
| October 12, 2005 | Lindsey's letter requesting participation by telephone |
| October 24, 2005 | Court's report of status conference and revised case management Order |
| January 12, 2005 | IDEM's request for status conference |

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5. In summary, the parties' briefing on Dairy's Motion to Dismiss challenged the statutory specificity of the Lindsey's Petition, and disputed whether the wastewater includes manure, and the pollution threat from silage.
6. The Lindseys did not file an Amended Petition for Administrative Review, nor did they seek leave to do so.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3.
2. The Lindsey's Petition for Administrative Review was timely filed, and they have stated sufficient facts to demonstrate that they are aggrieved or adversely affected by the permit in controversy, and are therefore eligible to seek administrative review of the permit issuance. *Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806 (Ind. 2004).
3. The Dairy filed its Motion to Dismiss, pursuant to T.R. 12(B)(6).
4. "In a 12(B)(6) motion, the court is required to take as true all allegations upon the face of the complaint, and may only dismiss if plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint." *Dixon v. Siwy* 661 N.E.2d 600, 603 (Ind.Ct.App. 1996). A 12(B)(6) motion is "made to test the legal sufficiency of the claim, not the supporting facts." *Blanck v. Indiana Department of Corrections* 806 N.E.2d 788, 790 (Ind.Ct.App. 2004) The Court must view the pleadings in a light most favorable to the non-moving party and must draw every reasonable inference in favor of that party. *Lattimore v. Amsler* 758 N.E.2d 568 (Ind.Ct.App. 2001). See *In Re: Objection to Construction Permit Application, Plans and Specifications for Thompson/Emerson Barrett Law Sewer, Petitioner Raymond Grahn*, (03-W-J-3225) 2004 OEA 40 (case referred to hereinafter as "Grahn"); *In Re: Wastewater Treatment Plant and Sanitary Sewer Construction Approval No. 16684, Sidney, Indiana*, (04-W-J-3393), 2004 OEA 99, 102 (case referred to hereinafter as "Sidney").
5. IC 13-15-6-2 requires that the written request for an adjudicatory hearing must contain the following information:
 - (1) State the name and address of the person making the request.
 - (2) Identify the interest of the person making the request.
 - (3) Identify any persons represented by the person making the request.
 - (4) State with particularity the reasons for the request.
 - (5) State with particularity the issues proposed for consideration at the hearing.
 - (6) Identify the permit terms and conditions that in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action.

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6. The Court in *Kunz* held that IC 13-15-6-3(a)(1) requires that the petitioner meet the requirements of IC 13-15-6-2 in order to maintain an action. *Grahn, Id.*; *Sidney, Id.*
7. In addition to the requirements under IC 13-15-6-2, 315 IAC 1-3-2 requires the following:
 - (b) The petition for administrative review shall contain the following information:
 - (1) Name, address, and telephone number of each person filing the petition.
 - (2) Identification of the interest of each petitioner in the subject of the petition.
 - (3) Statement demonstrating that the petitioner is:
 - (A) a person to whom the order is directed;
 - (B) aggrieved or adversely affected by the order; or
 - (C) entitled to review under any law.
 - (4) Statement with particularity the legal issues proposed for consideration in the proceedings and in a case involving an appeal of a permit:
 - (A) identification of environmental concerns or technical deficiencies related to the action of the commissioner which is the subject of the petition; and
 - (B) identification of permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.

Grahn, Id.; *Sidney, Id.*
8. In determining whether the petition meets the statutory requirements and states a claim upon which relief can be granted, OEA may only consider whether IDEM's decision was in compliance with the applicable statutes, regulations and policies. In this matter, the applicable statutes, rules and regulations do not require IDEM to alter its evaluation based upon the project cost. This Court does not have the authority to address issues such as cost.
9. The Lindsey's grounds for invalidating the permit are that the Dairy's operations caused harmful runoff onto the Lindseys' property and into the waters of the State, that the Dairy has failed in the past and will fail in the future to abide by the terms of its IDEM permit and the law, and that the Permit may not be consistent with the maintenance and operating terms of an NPDES permit which is under consideration, but not yet issued. The Lindseys did not amend their Petition nor provide the specificity required in Ind. Code Secs. 4-21.5-3, et seq., 13-15-6-2, and 315 IAC 1-3-2. The Lindseys have not identified any deficiency in the Permit as issued or in IDEM's permit review process.
10. The IDEM presumes that any person that receives a permit will comply with the applicable regulations and with future permits. OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana, 1998 WL 918589 (Ind.Off.Env.Adjud.)*; *Grahn, Id.*; *Sidney, Id.*; *In Re: Sanitary Sewer Construction Permit, Lafollette Station Towne Centre, US 150 and Lawrence Banet Road, 2004 OEA 67, 70 (03-W-J-3263).*

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11. This Court may not consider Petitioners' allegations of future violations as a basis for invalidating the Permit. *Grahn, Id.*
12. This is a Final Order issued pursuant to Ind. Code § 4-21.4-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
13. The ELJ concludes that, as Petitioners, the Lindseys allegations in opposition to the Permit have failed to state any claim upon which relief can be granted by the OEA, that the Lindsey's Petition must therefore be dismissed, and that the Dairy is entitled to judgment as a matter of law.

ORDER

AND THE COURT, being duly advised, hereby ORDERS, ADJUDGES AND DECREES that DeGroot Dairy's Motion to Dismiss for Failure to State a Claim is GRANTED. The contested final prehearing conference setting on January 30, 2006 and final hearing setting on February 6, 2006 are VACATED.

You are further notified that pursuant to the provisions of IC 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is an Order subject to further review consistent with applicable provisions of IC 4-21.5 and other applicable rules and statutes.

IT IS SO ORDERED this 30th day of January, 2006 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge